## BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

### I.

### OPINIONS BELOW.

The opinion of the United States District Court for the Southern District of New York was rendered April 30, 1945 (R. 110), and is reported in 61 F. Supp. 964.

The opinion of the United States Circuit Court of Appeals for the Second Circuit was rendered December 24, 1945 (R. 123), and is reported in 152 F. (2d) 845.

### II.

### STATEMENT OF THE CASE.

A statement of the facts and questions involved will be found in the petition for writ of certiorari on pages 2-6 thereof.

### III.

### SPECIFICATION OF ERRORS.

The United States Circuit Court of Appeals for the Second Circuit erred:

1. In affirming the judgment for respondents rendered by the United States District Court for the Southern District of New York;

2. In holding that the finding of defendant Samuel S. Lowe as deputy commissioner that the deceased died from accidental injury arising out of and in the course of his employment with plaintiff employer is supported by the evidence;

3. In holding that mere proof of causal relationship between conditions of deceased's work and his heart attack without there being any proof of unusual incident or unusual strain or unusual occurrence or unusual working con-

ditions or excessive exertion operating as a cause of said heart attack is sufficient to support a finding by defendant Samuel S. Lowe that deceased's death was a result of an "accidental injury" sustained in the course of his employment on February 15, 1943;

4. In holding in effect that recovery or "accidental injury" under federal Longshoremen's and Harbor Workers' Compensation Act does not require proof of an accident causing the injury.

## IV.

## ARGUMENT.

### Summary of the Argument.

Point 1: The questions involved, concerning the interpretation of a federal statute, are of substantial general importance, and should be definitely settled by this Court.

Point 2: The Circuit Court of Appeals below erroneously interpreted the term "accidental injury" as used in Section 2(2) of the Longshoremen's and Harbor Workers' Compensation Act (33 U. S. C. 902(2)), and consequently erroneously held that the finding of the Deputy Commissioner, that death of deceased was caused by accidental injury, is supported by substantial evidence.

### Point 1.

The questions involved, concerning the interpretation of a federal statute, are of substantial general importance, and should be definitely settled by this Court.

The definition and meaning of "accidental injury" is of paramount importance to all employees and their families and to all employers under the Act because it provides the very basis for putting the Act into operation and awarding compensation. The primary purpose of every workmen's compensation statute is to make provision for the results of accidental injury. This is likewise true of the federal Act

here in issue (which Act also includes as compensable "injury" occupational disease and injury caused by willful act of a third person, neither of which is involved in this case).

The Circuit Court of Appeals below has extended the meaning of what is ordinarily and popularly considered as accidental to include sickness or death resulting from the effect of a person's normal and usual work activities on a pre-existing and progressive disease. It is obvious that such definition will affect, as well as result in, a large number of claims under the Act.

It is of the utmost importance that the matter be settled by this Court. Such action would have the benefit of preventing the filing of numerous unfounded claims and defenses or the denial of numerous just claims and defenses, with all the attendant expenses of litigation through the various phases of appeal and review in the federal courts.

Few questions concerning the Act could be more important that the proper interpretation of "accidental injury", the happening which in most cases is the starting point for all rights and proceedings under the Act. A decision in this regard will constitute "a precedent of general application." See *Del Vecchio* v. *Bowers*, *supra*, 285.

**Point 2.**

The Circuit Court of Appeals below erroneously interpreted the term "accidental injury" as used in Section 2(2) of the Longshoremen's and Harbor Worker's Compensation Act (33 U. S. C. 902(2)), and consequently erroneously held that the finding of the Deputy Commissioner, that death of deceased was caused by accidental injury, is supported by substantial evidence.

It is respectfully submitted that "accidental injury" means injury by accident, and requires the claimant to produce proof of an accident, i.e., proof of some unexpected and unforeseen event definable in space and time, as a result of which the deceased met his death. Such unexpected and unforeseen event may be either an unusual incident or un-

usual strain or unusual occurrance or unusual working conditions or excessive exertion. This view is supported by the following authorities:

*Pierce* v. *Phelps Dodge Corp.*, 26 Pac. (2d) 1017, Arizona, 1933;
*Standard Gas Equipment Corp.* v. *Baldwin*, 152 Md. 321, 136 A 644 (1927);
*Woodruff* v. *Howes*, 228 N. Y. 276, 127 N. E. 270 (1920);
*La Fountain* v. *La Fountain*, 284 N. Y. 729 (aff'g 259 AD 1095) (1940);
*Lamphier* v. *Air Preheater Corp.*, 278 N. Y. 403, 16 N. E. (2d) 382;
*Beaver* v. *Town of Collins*, 263 A. D. 1033, New York (1942);
*Crispin* v. *Leedom A. Worrall*, 341 Pa. 325, 19 A (2d) 400 (1941);
*Rathmell* v. *Borough of Wesleyville*, 351 Pa. 14, 40 A (2d) 28 (1944).

It is difficult to understand how normal activities at work may constitute an accident except by torturing the term "accidental injury" into something it actually does not mean. When ordinary work conditions cause a pre-existing disease to become acute, there is nothing more than ordinary wear and tear which the Act is not intended to provide for. There comes a time in the life of everyone who lives without accident, when normal and unpreventable deterioration of body organs reaches a point that the exertion of normal activities will cause a breakdown evidenced by acute illness or death. To hold that an accident has occurred if such time happens to arrive during hours of employment extends the coverage of the Compensation Act far beyond the legislative intention, and converts it into health or life insurance. The federal Compensation Act, like other such acts, was designed to avoid the harshness of the common law rule of recovery based on negligence and to provide relief to workmen and their families for industrial mishaps. The cost of such relief becomes part of the expenses of production, is borne by the employers and

the ultimate consumer, principally the latter in the form of increased prices of consumer goods. While it is reasonable for the cost of consumer goods to include the expense of industrial accidents and occupational diseases, there is no reason in the absence of clear congressional intent to strain the meaning of "accidental injury" in order to provide general health and life insurance for the special benefit of one group at the expense of all.

Congressional intent in this matter is further shown by the fact that the New York courts, in construing the New York Workmen's Compensation Law (upon which the federal Act was modeled) support petitioners' contention. *Woodruff* v. *Howes, supra; La Fountain* v. *La Fountain, supra; Lamphier* v. *Air Preheater Corp., supra; Beaver* v. *Town of Collins, supra; Flammer* v. *Bethlehem Steel Co.*, 268 A. D. 944, 51 N. Y. S. (2d) 258; (and the other cases cited in footnote to opinion below (R. 124)).

The decision of the Court below holding in effect that an injury is compensable merely if it occurs in the course of employment and has some reference to the work being performed will lead to the filing and granting of many claims of no validity as where death or the acute stage of an illness is merely coincidental with, or occurs after, business hours, with no causal relationship between work and "injury". As a practical matter under the view upheld below, there will be in this type of case usually little or nothing tangible showing causal relationship between work and the "injury". Professor Bohlen (25 Harvard Law Review 328, 344) aptly states the problem as follows:

> "The English courts, in their efforts to remedy the omission of Parliament to provide relief for workmen incapacitated by disease, have opened a wide door to claims of highly litigious character, * * *. At first glance there appears little or no abstract justice in giving relief to one whose physical structure is violently deranged while at work, and denying it to one who is incapacitated by disease clearly proven to have been contracted in his employer's service. But there is a great practical difference between the two. Where there is a distinct change in the physical structure of

the plaintiff, it is in the vast majority of cases possible and even easy to show some definite occurrence in the course of his service which has produced it, or at least the injury is generally one not likely to result from any other cause. The difficulty which will arise if compensation is allowed for disease lies in the fact that not only its existence but its origin can as a rule be proved only by the statement of the sufferer himself, corroborated by the testimony of his physician, which usually goes no further than a statement that the disease might be caused by some incident of the employment. Such claims are not only particularly easy to fabricate, but there is a great tendency in a sufferer to ascribe, without conscious dishonesty, his illness to some cause from which he may hope to obtain relief. But even if they are honestly put forward, the success or failure of such claims must depend upon a highly doubtful issue of fact. If such claims be allowed there will be a natural tendency on the part of every workman who suffers from disease to ask the opinion of the court whether it arose out of the business, and even where it is fairly clear that the illness did so arise, the interest of the employer will naturally induce him to contest the claim in the hope that the opinion of the court may be in his favor."

The question of accidental injury, due to the amount of litigation under the workmen's compensation acts of the various states and this federal Compensation Act, has given rise to so many conflicting judicial opinions that it is impossible to reconcile them and impractical to attempt to discuss them in any extended way. There are two views on the question at issue. The view adopted by the Court below seems to have originated in the English cases of *Fenton* v. *Thorley*, A. C. 443, 1903, and *Clover, Clayton & Co.* v. *Hughes*, L. R. A. C. 1910, pg. 242, 3 B.W.C.C. 275. It is respectfully submitted that the courts following the English rule overlook or give no effect to the qualifying effect of the words "accidental" or "by accident", and do not rightly interpret the statute. The Arizona Supreme Court in criticizing the reasoning of the English cases stated in *Pierce* v. *Phelps Dodge Corp.*, *supra*, 1020, as follows:

> "But it failed apparently to see that the only possible effect of the use of the words 'injured by' in the phrase is to establish that the accident referred to therein is the cause and not the effect. The injury referred to is obviously a result. If, then, in this connection the word 'accident' is also a result, it is tantamount to saying that the phrase means 'an injury by injury' or a 'result by a result.' Notwithstanding our respect for the decisions of so eminent a tribunal and the similarity of the language in the two acts, we cannot believe that our Legislature when it adopted our Compensation Act intended to attribute to ordinary words such an absurd meaning. If, on the other hand, the phrase was intended to mean a result from a certain kind of cause, it is intelligible and has a fixed and definite application. Had our Legislature intended that the word 'injury' and 'accident' both meant a result, it should and doubtless would have joined them by the conjunction 'or' rather than the preposition 'by.'"

The following comment is made concerning *Clover, Clayton & Co.* v. *Hughes, supra,* in 11 Columbia Law Review, page 44 :

> "* * * the decision is not very convincing. One cannot help feeling that there is a great force in the dissenting opinion which proceeded on the view that the man died from heart disease and not from 'accident.'"

The cases cited as authority in the opinions below mention with approval the English rule which for reasons set out above is unsound and does not reflect the congressional intent expressed in the federal Act. Moreover, the decision in each of those cases cited in the opinions below can be justified on the ground that as a matter of fact the injury was caused by excessive exertion or unusual circumstances in the course of employment.

## V.

## CONCLUSION.

It is, therefore, respectfully submitted that this case is one calling for the exercise by this Court of its supervisory powers, in that the questions here involved may be permanently settled by this Court and a proper construction and interpretation made of Section 2 of the Longshoremen's and Harbor Workers' Compensation Act, and that to such an end a writ of certiorari should be granted and this Court should review the decision of the United States Circuit Court of Appeals for the Second Circuit and finally reverse it.

NELSON T. HARTSON,
HOWARD BOYD,
GEORGE E. MONK,
*Counsel for Petitioners.*